

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DANIEL GOUIN,

Plaintiff,

V.

CLALLAM COUNTY; DAVE MEYER and PILI MEYER, and the marital community comprised thereof; and MARJORIE UPHAM, and the community comprised thereof,

Defendant.

Case No. C06-5247 FDB

ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT
DISMISSING PLAINTIFF'S COMPLAINT

This matter comes before the Court on Defendants' Motion for Summary Judgment seeking dismissal of Plaintiff's claims for employment discrimination and wrongful termination of employment. Defendants assert that Plaintiff's claims are barred by the statute of limitations. After reviewing all materials submitted by the parties and relied upon for authority, the Court is fully informed and hereby grants the motion of the Defendants and dismisses Plaintiff's case for the reasons stated below.

INTRODUCTION AND BACKGROUND

Plaintiff Daniel Gouin was employed by Clallam County in its Information Technology Department as a Programmer Analyst II. During the County's fiscal years 2001 - 2003, the County

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1 was subject to a fiscal restraints due to loss of funding. The County considered and made various
2 staffing reductions, especially in the middle management positions of the various departments. The
3 termination of Plaintiff's employment is purported to be one of these reductions.

4 On October 24, 2002, the County Administrator advised Mr. Gouin by letter of his
5 recommendation for layoff as part of the countywide reduction in force. The final decision on the
6 recommendation for this action to be determined by the County Board as part of the budget
7 adoption. As a part of this recommendation, Mr. Gouin was placed on paid administrative leave
8 effective immediately and continuing until December 31, 2002. Plaintiff was also notified of his
9 rights pursuant to the union contract to elect either a severance or recall. On October 29, 2002, Mr.
10 Gouin responded to the notification by indicating that in the event that the position of Programmer
11 Analyst II is eliminated, as recommended, he would opt for severance, rather than recall.

12 By letter dated December 17, 2002, the County "officially notified" Daniel Gouin "that the
13 position of Programmer Analyst II has been eliminated as of December 31, 2002. The position is
14 being eliminated as part of a countywide reduction in force caused by declining revenues."

15 Mr. Gouin responded to the notification of termination on December 20, 2002, by letter from
16 his attorney, Michael Danko, providing "notice of legal representation [of Mr. Gouin] and his
17 grievance regarding his termination of employment as stated in the letter of October 24, 2002, and
18 reiterated in the letter of December 17, 2002." The letter from Mr. Gouin's counsel stated that "Mr.
19 Gouin contends that the County's stated basis for the termination is pretextual, and is in fact a
20 continuation of the harassment and discrimination to which he has been subjected for the last several
21 years, and for which he filed a complaint with EEOC."

22 Plaintiff's employment with the County ended on December 31, 2002. On June 3, 2003, the
23 EEOC notified Mr. Gouin of the dismissal of his complaint. The notification stated that the EEOC
24 investigation failed to find any violation of federal law as alleged in his complaint. Mr. Gouin was
25 provided notification of his right to file a lawsuit within 90 days of receipt of the notice of dismissal.

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1 Mr. Gouin did not file a lawsuit concerning the allegations of his pre-termination complaint.

2 Plaintiff Daniel Gouin filed a tort claim on December 23, 2005, against Clallam County and
3 the individually named defendants claiming he was wrongfully discharged, discriminated against by
4 virtue of his age, religious beliefs, and disabilities, and that his civil rights were violated. On
5 February 22, 2006, Plaintiff filed his complaint in Clallam County Superior Court.

6 Defendants move to dismiss the lawsuit as being barred by the statute of limitations.

7 **SUMMARY JUDGMENT STANDARD**

8 The purpose of summary judgment is to identify and dispose of factually unsupported claims
9 and defenses. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). On a motion for summary
10 judgment, the court is constrained to draw all inferences from the admissible evidence in the light
11 most favorable to the non-moving party. Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1134 (9th Cir.
12 2000). Summary judgment is appropriate where there is no genuine issue of material fact and the
13 moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party
14 bears the initial burden to demonstrate the absence of a genuine issue of material fact. Celotex Corp.
15 v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party has met its burden, the opposing party
16 must show that there is a genuine issue of fact for trial. Matsushita Elect. Indus. Co. v. Zenith Radio
17 Corp., 475 U.S. 574, 586-87 (1986). A dispute as to a material fact is “genuine” if there is sufficient
18 evidence for a reasonable jury to return a verdict for the nonmoving party. Anderson v. Liberty
19 Lobby, Inc., 477 U.S. 242, 248 (1986). The opposing party must present significant and probative
20 evidence to support its claim or defense. Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d
21 1551, 1558 (9th Cir. 1991). Affidavits made on personal knowledge and setting forth facts as would
22 be admissible at trial are evidence that a court may consider when determining whether a material
23 issue of fact exists. Fed. R. Civ. P. 56(e). Legal memoranda and oral argument are not evidence and
24 do not create issues of fact. See British Airways Bd. v. Boeing Co., 585 F.2d 946, 952 (9th Cir. 1978).
25 Nor will uncorroborated allegations and “self-serving testimony” create a genuine issue of material
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1 fact. Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1061 (9th Cir. 2002); T.W. Elec. Serv. v.
 2 Pac. Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir. 1987). The nonmoving party must instead
 3 set forth "significant probative evidence" in support. T.W. Elec. Serv., at 630. Summary judgment
 4 will thus be granted against a party who fails to demonstrate facts sufficient to establish an element
 5 essential to his case when that party will ultimately bear the burden of proof at trial.

6 STATUTE OF LIMITATIONS

7 The parties are in apparent agreement that Plaintiff's claims are subject to a 3-year statute of
 8 limitations.¹ The dispute concerns the date Plaintiff's causes of action accrued. Plaintiff argues the
 9 proper date is the date of actual termination of employment, December 31, 2002. Thus, the filing of
 10 the tort claim with the County on December 23, 2005, would comply with the 3-year limitations
 11 period.² Defendants contend that the Plaintiff received sufficient notice of his termination on October
 12 24, 2002, or at the latest, on December 20, 2002. Thus the statue of limitations would bar Plaintiff's
 13 suit, it being filed more than three years subsequent to December 20, 2002.

14 The period in which a claim for wrongful discharge may be brought begins to run once the
 15 employee is notified of her termination. Eisenberg v. Insurance Co. of North America, 815 F.2d
 16 1285, 1291 (9th Cir. 1987); Daniels v. Fesco Div. of Cities Services Co., 733 F.2d 622, 623 (9th Cir.
 17 1984); Delaware State College v. Ricks, 449 U.S. 250 (1980). The cause of action accrues and the
 18 statute of limitations commences to run, upon notice to the employee of the decision to terminate,

20 ¹ In Washington, claims under 42 U.S.C §1983 must be filed within three years. Rose v.
 21 Rinaldi, 654 F.2d 546, 547 (9th Cir. 1981). Claims for wrongful discharge are subject to the 3-year
 22 statute of limitations under RCW 4.16.080. Douchette v. Bethel School Dist. No. 403, 117 Wn.2d
 23 805, 809 nt.1 (1991). The statute of limitations for actions involving discrimination under RCW
 24 49.60.180 is 3 years. Nearing v. Golden State Foods Corp., 114 Wn.2d 817, 820 (1990). Claims
 based on the Age Discrimination in Employment Act of 1967 (ADEA) must be commenced within 2
 years, except that claims for willful violations may be commenced within 3 years. 29 U.S.C. §
 626(e), § 255. Douchette, at 809-10.

25 ²The statute of limitations is tolled for the 60-day waiting period immediately after filing a
 tort claim with the County. See, RCW 4.96.020(4).

1 even though the employee continues to work for the employer after receipt of the notice. Daniels, at
2 623. The United States Supreme Court established in Delaware State Coll. v. Ricks, 449 U.S. 250,
3 258 (1980) and Chardon v. Fernandez, 454 U.S. 6, 8 (1981) that a cause of action accrues when the
4 operative decision is made, not when the decision is carried out. In Ricks, the trustees of a college
5 denied tenure to plaintiff, a professor, but they offered him a “terminal” contract to teach one
6 additional year. Ricks sued, claiming that his denial of tenure was discriminatory. The Court held
7 that the limitations period commenced when the tenure decision was made and Ricks was notified, not
8 when the employment ended. Ricks, at 258. Similarly, in Chardon, a § 1983 case, the Court
9 concluded that the statute of limitations began to run when plaintiffs, several non-tenured
10 administrators, were given notice of termination, not on the date their employment terminated.
11 Chardon, at 8. See also, RK Ventures, Inc. v. City of Seattle, 307 F.3d 1045, 1058-1061 (9th Cir.
12 2002). Thus, claims for employment discrimination premised on wrongful termination accrue when
13 notice of termination is communicated to the employee. Mere continuity of employment, without
14 more, is insufficient to prolong the cause of action for employment discrimination or wrongful
15 discharge. See, Douchette v. Bethel School Dist. No. 403, 117 Wn.2d 805, 816 (1991).

16 The Court finds it unnecessary to determine whether the statute of limitations runs from the
17 October 25, 2002, letter notifying Mr. Gouin of the recommendation of termination. Even assuming
18 the October notification to be equivocal, it is without question that Plaintiff received notification of
19 the termination of his employment no later than December 20, 2002. This notice was unequivocal
20 notification of termination. Plaintiff admits he received this letter that “officially” notified him his
21 position would be eliminated effective December 31, 2002. The responding letter from Mr. Gouin’s
22 counsel demonstrates that his receipt of this notification occurred no later than December 20, 2002.

23 Thus, Plaintiff’s causes of action for wrongful termination accrued no later than December
24 20, 2002. Plaintiff’s lawsuit is time-barred as it was filed more than three years after December 20,
25 2002.

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1 EQUITABLE AND STATUTORY TOLLING

2 Plaintiff seeks to avoid the time bar through application of statutory or equitable tolling.

3 Plaintiff seeks application of RCW 4.16.190 which provides tolling of the statute of
4 limitations during disability or incompetence. RCW 4.16.190 applies if a claimant is “at the time the
5 cause of action accrued” incompetent or disabled to such a degree that he or she cannot understand
6 the nature of the proceedings. Id. The party asserting he is entitled to tolling of the statute of
7 limitations bears the burden of proof. Rivas v. Eastside Radiology Associates, 134 Wn.App. 921,
8 927 (2006). The plaintiff must show that a guardianship would have been appropriate had one been
9 sought when the cause of action accrued, and the court must look back to determine whether, at the
10 time the cause of action accrued, the plaintiff was incapacitated to the degree necessary to permit
11 appointment of a guardian. Rivas, at 928.

12 Plaintiff has offered no medical evidence that he was so incapacitated at the time the cause of
13 action accrued that he was not able to understand the nature of his wrongful termination proceeding
14 and or that he should have had a guardian appointed to act on his behalf. To the contrary, Plaintiff
15 Gouin immediately responded to his termination notice through his attorney, asserting that stated
16 basis for his termination was pretextual and in fact a continuation of the harassment he complained of
17 in a previously filed EEOC complaint. This, and other uncontroverted evidence of Mr. Gouin’s
18 interaction with the County subsequent to the notice of termination, leaves the Court but one
19 conclusion, that Plaintiff is not entitled to the tolling provisions of RCW 4.16.190.

20 The doctrine of equitable tolling “has been consistently applied to excuse a claimant’s failure
21 to comply with the time limitations where he had neither actual nor constructive notice of the filing
22 period.” Leorna v. U.S. Dep’t of State, 105 F.3d 548, 551 (9th Cir. 1997). If a reasonable plaintiff
23 would not have known of the existence of a possible claim within the limitations period, then
24 equitable tolling will serve to extend the statute of limitations for filing suit until the plaintiff can
25 gather what information he needs. Johnson v. Henderson, 314 F.3d 409, 414 (9th Cir. 2002).

1 Equitable tolling may be applied if, despite all due diligence, a plaintiff is unable to obtain vital
 2 information bearing on the existence of her claim. Santa Maria v. Pac. Bell, 202 F.3d 1170, 1178 (9th
 3 Cir. 2000). The doctrine excuses a plaintiff's failure to comply with the time limitations where she
 4 had neither actual nor constructive notice of the filing period. Leorna, at 551; Stallcop v. Kaiser
 5 Found. Hosps., 820 F.2d 1044, 1050 (9th Cir. 1987). Equitable tolling is not appropriate and the
 6 time period for filing begins to run when the facts that would support a charge of discrimination
 7 would have been apparent to a similarly situated person with a reasonably prudent regard for his
 8 rights. Boyd v. United States Postal Service, 752 F.2d 410, 414 (9th Cir. 1985). Equitable tolling
 9 focuses on the plaintiff's excusable ignorance of the limitations period and is "not available to avoid
 10 the consequences of one's own negligence." Lehman v. United States, 154 F.3d 1010, 1016 (9th Cir.
 11 1998).

12 Equitable tolling is not appropriate in this action as Plaintiff has not alleged facts sufficient to
 13 establish an equitable basis for tolling the time limitations for presenting his claim. Prior to his
 14 receipt of the notice of termination, Mr. Gouin had filed a discrimination complaint with the EEOC.
 15 Upon receipt of the December 19, 2002, notice of termination, Plaintiff immediately responded
 16 through counsel with the assertion that his termination was pretextual and in fact a continuation of the
 17 previous discrimination complained of in the EEOC filing. Despite this knowledge Plaintiff waited
 18 more than three years before commencing his lawsuit. Equitable tolling is not justified.

19 **CONCLUSION**

20 For the reasons set forth above, Defendants are entitled to summary judgment of dismissal of
 21 Plaintiff's claims in their entirety.

22 ACCORDINGLY,

23 IT IS ORDERED:

24 Defendants' Motion for Summary Judgment [Dkt. #23] is GRANTED, and this case
 25 dismissed in its entirety.

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1 DATED this 13th day of July, 2007.

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FRANKLIN D. BURGESS
UNITED STATES DISTRICT JUDGE

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